THE CALIFORNIA SUPREME COURT
Historical Society
NEWSLETTER · AUTUMN/WINTER 2006

Chief Justice Phil Gibson and the justices of the California Supreme Court in 1963, just before Gibson's retirement.
Seated, left to right: Roger J. Traynor, Phil Gibson, and B. Rey Schauer.
Standing, left to right: Mathew O. Tobriner, Marshall F. McComb, Raymond E. Peters and Paul Peek.

An Interview with Phil Gibson

BY EDWARD L. LASCHER

EDITOR'S NOTE: AT THE HEIGHT OF THEIR CAREERS, CHIEF JUSTICE PHIL GIBSON AND LAWYER-COLUMNIST ED LASCHER OF THE *STATE BAR JOURNAL* WERE THE DOMINANT VOICES OF THEIR TIME. HERE WE ARE DELIGHTED TO SHARE A NEVER-BEFORE PUBLISHED INTERVIEW OF THE CHIEF JUSTICE BY LASCHER IN 1963, PROVIDED COURTESY OF WENDY C. LASCHER OF LASCHER & LASCHER IN VENTURA.

During his introduction to the second edition of his much-noted *California Courts and Judges Handbook,* lawyer-author Kenneth James Arnolds observed:

"Among the giants who loom large in recent history is a remarkable man who spent a quarter of a century on the California Supreme Court — 24 years as chief justice. Judicial reform was his personal crusade. He was the driving force of the court reorganization program. He fathered pre-trial procedure and non-publication of judicial opinions. He regenerated the Judicial Council and improved the administration of justice in countless ways. His long and fervent advocacy of penal reform is hopefully nearing fruition. Judged by his accomplishments, he must be 208 years old; judged by his vigor, Phil S. Gibson may outlive us all."

True words, indeed, about the man who personified the title: "The Chief." In view of current interest in judicial reform, particularly at the level where Chief Justice Gibson's impact was most immediately felt, the *State Bar Journal* sought his views on some aspects of the contemporary appellate scene.

The Chief's response to our request for an interview was negative, for a characteristic reason: "Nobody wants to hear what I've got to say; talk to those who are on the scene." Perhaps the *Journal* never convinced him, but we did wear down his resistance, and our interviewer spent as delightful a

Continued on page 8

The California Supreme Court, 1940-2005: A Preliminary Measure of Influence

BY JAKE DEAR AND EDWARD W. JESSEN

THE SOCIETY'S 2006 PANEL PROGRAM

The Society's annual panel program, held at the California State Bar's Annual Meeting on October 7, 2006, in Monterey, California, was titled "California — Laboratory of Legal Innovation." (See color insert to this Newsletter; see also the Society's home page, www.cschs.org/images_features/cschs_monterey-2006.pdf.) The program was moderated by Elwood Lui, former Associate Justice, California Court of Appeal, and currently Partner-in-Charge in San Francisco, Jones Day. Panelists were California Supreme Court Associate Justice Kathryn Mickle Werdegar; Joseph R. Grodin, former Associate Justice, Supreme Court of California, and currently Distinguished Professor Emeritus, U.C. Hastings College of the Law; Harry N. Scheiber, Riesenfeld Professor of Law and History, and Director, Institute for Legal Research, Boalt Hall School of Law, U.C. Berkeley; Robert F. Williams, Distinguished Professor of Law, and Associate Director, Center for State Constitutional Studies, Rutgers University School of Law, Camden; and Gerald F. Uelmen, Professor and former Dean, Santa Clara University School of Law.

After California Supreme Court Associate Justice Kathryn Mickle Werdegar was asked to participate in the Historical Society's annual panel program in October 2006, we met with her and other court staff and began to reflect on some leading cases that the court has decided, and potentially similar cases the court will confront in the near future.

During the course of our exchanges we began to consider generally the meaning of legal "innovation," and specifically, how one could assess or measure any given court's innovation. We posited that one way of measuring innovation (or at least *influence* — an aspect of innovation) might be by examining the frequency with which the decisions of various state supreme courts have been adopted or relied upon by state courts of other jurisdictions.

This in turn led us eventually to a body of "citation analysis" literature. Citation analysis long has been employed in related contexts to examine questions such as the nature and type of authorities relied upon by a court, and even to measure the relative sway of law review articles and prestige of law school faculties. We also found a few relevant studies that looked at comparative influence of courts, by measuring how frequently various courts are cited by others. Nevertheless, as the studies candidly acknowledged, when used to compare the work of *courts,* citation analysis can be problematic because of the basic overinclusiveness of citations: A later decision may cite a case to distinguish, criticize or even disagree with it; or it may cite to a collateral matter unrelated to the case's main holding; or it may cite a case as one of many in a bare "string citation" without any special acknowledgment of the merits or value of the cited case.

For these reasons, among others, some studies criticize citation analysis while simultaneously employing that method as the only reasonably objective game in town. But although we found a few recent comparative influence studies of the United States federal courts (and also of the Canadian and Australian courts), we were unable to locate any study published in the past two decades addressing the comparative influence of state high courts. Mindful of these problems and yet hoping to build constructively upon the prior methodologies, we set about to see if we could collect relevant state court data that would provide a more reliable indicator of state high court influence. That led to this research.

"Followed" Cases, 1940-2005: A Preliminary Report

Shepard's Citation Service for more than 100 years has analyzed every decision filed by every appellate court in every state to determine its subsequent "treatment" — that is, whether it has been, among other things, "criticized," "distinguished," "limited," "overruled," "questioned," or *"followed."* Through its staff of professional editors, Shepard's has continuously applied its "followed" designation when *"[t]he citing opinion relies on the case . . . as controlling or persuasive authority."* In other words, if an earlier opinion from, for example, the Nebraska Supreme Court is cited and treated as persuasive authority in a subsequent decision by the Ohio Supreme Court, the independent editors at Shepard's provide a notation in its published history of the Nebraska decision, showing a legal researcher that it has been "followed" by the Ohio decision. As observed in one prior study, Shepard's classification system is "widely used in the legal community to evaluate the status of existing precedents" and, "with appropriate qualifications," Shepard's "constitutes a relevant data source that ought to be used in studying judicial behavior."

Working with LexisNexis, the current provider of Shepard's Citation Service, we identified all opinions since 1940, for each of the 50 state high courts, that Shepard's has designated as having been followed by a state court outside the originating jurisdiction, and the number of times each such case has been followed. The data reflects nearly 24,400 state high court decisions that

were followed at least once — and most only once — by out-of-state courts during the 66 years under review.

Preliminarily, however, we emphasize that the raw number of Shepard's "follows" generated by a case often represents only the tip of the iceberg in terms of any particular decision's real-life influence. For example, in the area of business law, a state high court opinion may quickly prophylactically affect business practices in the home state and nationwide so that the underlying issue is unlikely to arise in a similar context in another state. Such decisions may have far-reaching impact but result in few measurable "follows." Accordingly, the number of "followed" cases is not a definitive measure of the impact of a particular court's cases, but instead a device useful in confirming and discerning trends.

As explained below, the data reveals that the California Supreme Court has been, and continues to be, the most "followed" state high court in the nation. This result is consistent with the prior citation analysis studies that were published in the early 1980's and based on data from 30 to 35 years ago. The data also shows the positions of the other 49 states; some of those differ significantly from the results of the prior citation-analysis studies.

DESCRIPTION OF THE PRELIMINARY DATA

Graph 1 shows, for all 50 states, the number of decisions that have been followed at least once by an out-of-state court during the 66-year period of the study (1940-2005). As a general matter, state high courts during this period produced roughly the same number of full written opinions each year. California is the clear leader. Washington and Colorado are next, followed by Iowa, Minnesota and Kansas.

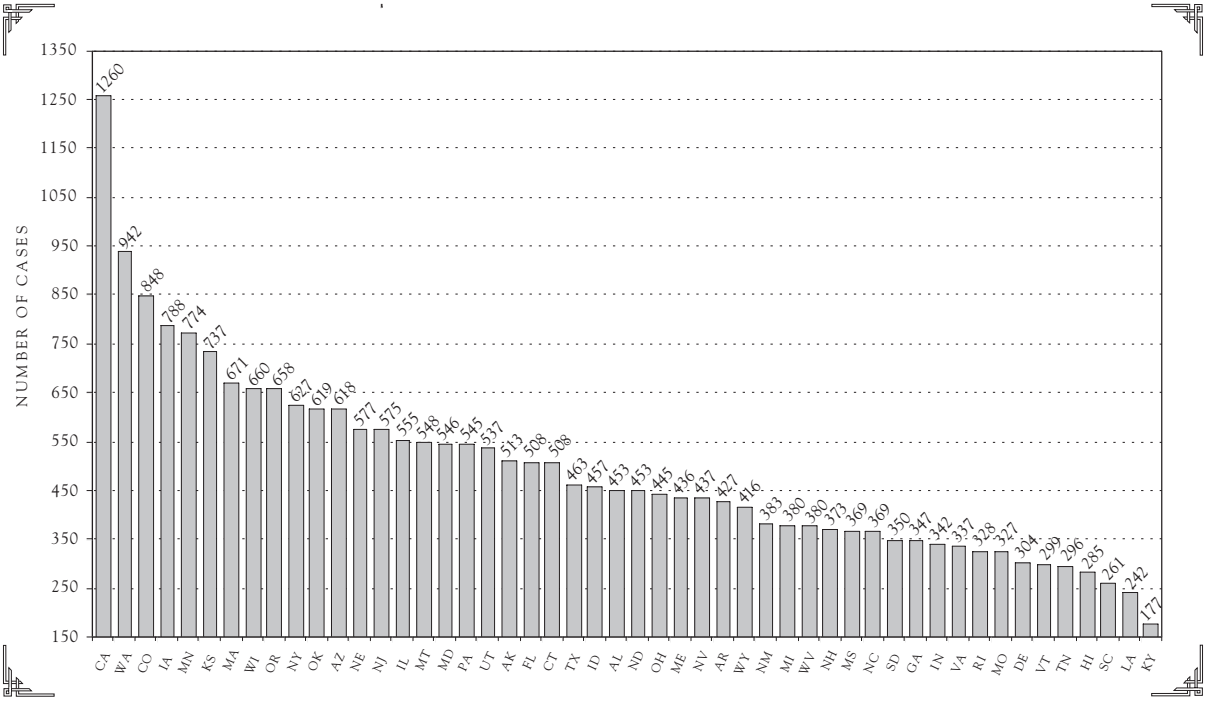
That a decision is voluntarily followed one time by a single state court of another jurisdiction is of interest, but a more telling measure of the impact of any given decision may be disclosed by whether the decision has been voluntarily followed *multiple* times by state courts of other jurisdictions. Graph 2 depicts that information.

Graph 2, shows, for all 50 states, the number of decisions that have been followed *three or more times* by out-of-state courts. California is again the clear leader. In this graph, Washington is again second and New Jersey is third, followed by Kansas, Minnesota, and Massachusetts.

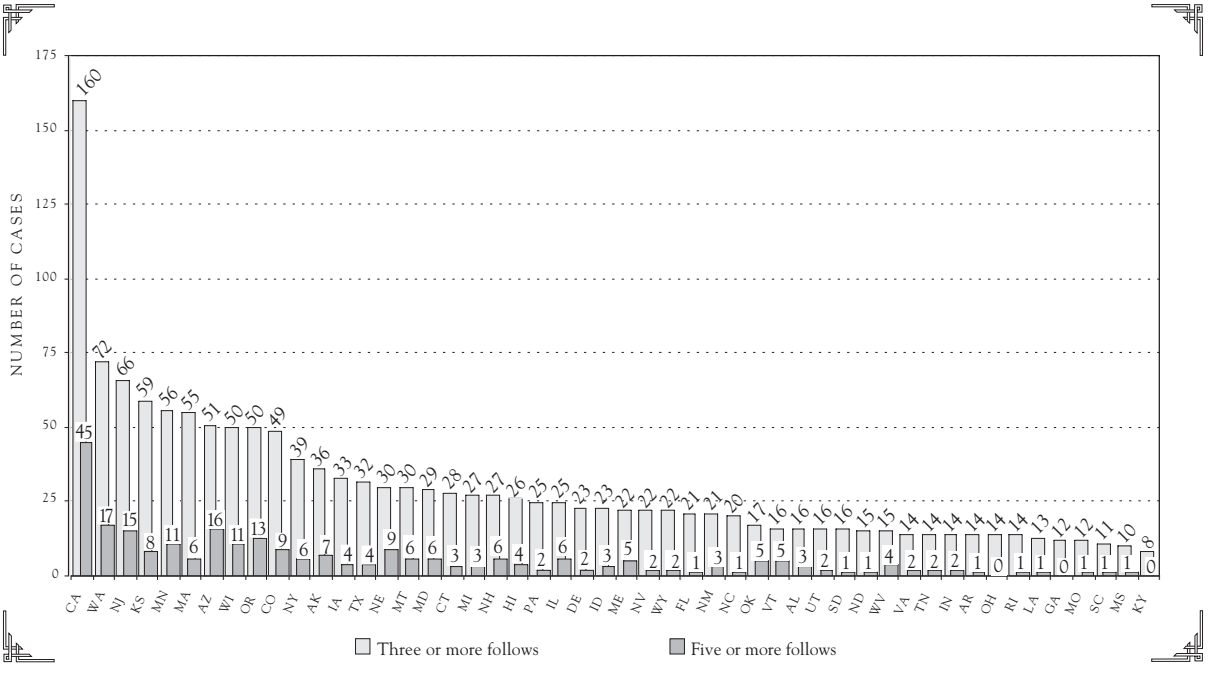
Graph 2 also depicts, as a subcategory of each state's group of cases, the number of decisions that have been followed *five or more times* by out-of-state courts. California clearly leads, Washington and Arizona are second and third; then come New Jersey, Minnesota and Wisconsin.

In addition to looking at this cumulative 66-year picture, we focused on the most current data. Graph 3 depicts the number of decisions that have been followed at least three times by out-of-state courts during the most recent 20-year period of the study (1986-2005). California is the leader, Washington is second, and Massachusetts is third, followed by Kansas and New Jersey.

Finally, Graph 3 also shows, as a subcategory, the number of decisions that have been followed at least



GRAPH 1: NUMBER OF DECISIONS THAT HAVE BEEN FOLLOWED AT LEAST ONCE BY AN OUT-OF-STATE COURT, BY STATE, 1940–2005



GRAPH 2: NUMBER OF DECISIONS THAT HAVE BEEN FOLLOWED AT LEAST THREE TIMES BY OUT-OF-STATE COURTS, BY STATE, 1940–2005

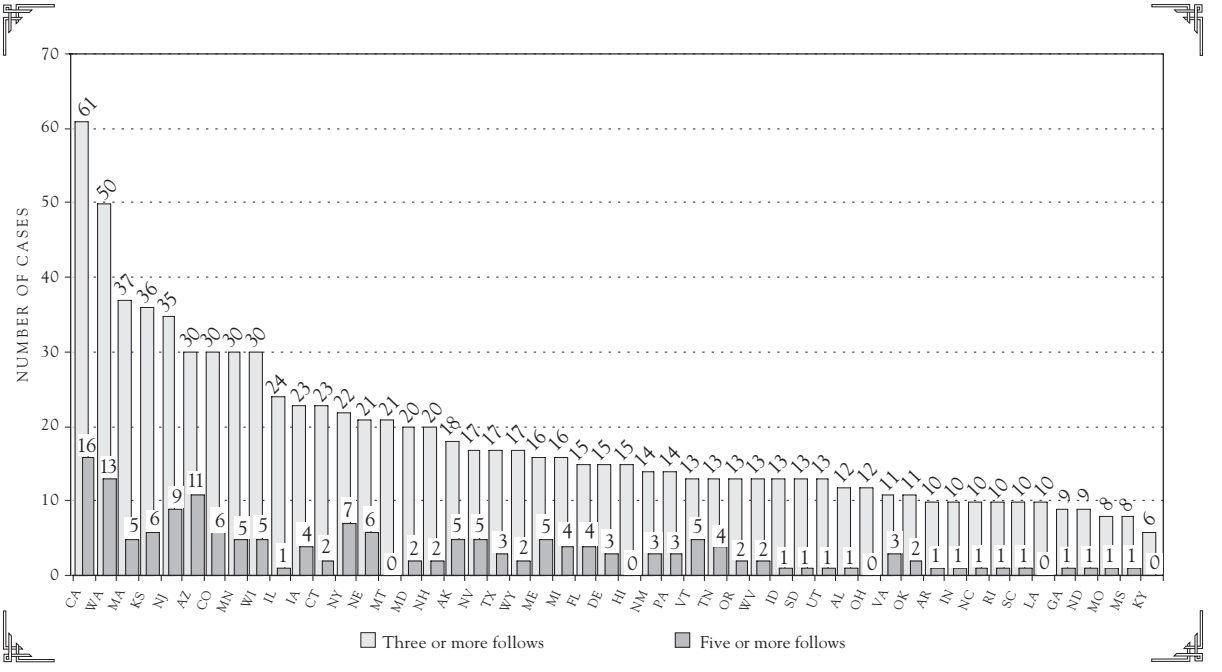
five times by out-of-state courts during the most recent 20 years. The order again is California, Washington, and Arizona, followed by New Jersey and New York.

The results set forth in these first three graphs are, in one significant respect, consistent with the decades-old citation-analysis literature mentioned earlier, which consistently placed California at the top of all influence rankings. But our results differ significantly from the prior studies with respect to the next tier of rankings. The earlier studies that were based on citation data ending 30 to 35 years ago showed the second and third jurisdictions as New York and New Jersey, and the fourth and fifth states as either Pennsylvania and Massachusetts, or Illinois and Texas. Our current data shows that Washington has replaced New York in the second position, and that New Jersey and Massachusetts have generally maintained their positions.

The last graph, number 4, takes a California-only look at the 66-year data. This graph shows the annual average number of decisions that have resulted in at least three "follows" by out-of-state courts, based on cases generated during the terms of the six most recent California Chief Justices. In other words, we determined the total numbers of "three-or-more" (and "five-or-more") opinions filed during the period in which each Chief Justice led the court, then divided that total by the number of years in that term.

Just as it can be problematic to compare baseball players of different eras, so too can comparisons of courts over different eras be problematic. With this caveat in mind, we turn to a preliminary look at the data. Graph 4 shows the term with most "followed" decisions to have been that of Chief Justice Malcolm M. Lucas (Feb. 1987 to Apr. 1996) — the court produced on average five such opinions per year that have, so far, been followed at least three times. Closely following the Lucas court era is the term of Chief Justice Donald R. Wright (Apr. 1970 to Feb. 1977) — the court produced on average almost five opinions each year that have, so far, been followed at least three times.

The court under Chief Justice Roger J. Traynor (Sept. 1964 to Feb. 1970) annually produced more than three decisions that have been followed at least three times. The court under Chief Justice Rose Elizabeth Bird (Mar. 1977 to Jan. 1987) likewise annually produced slightly more than three decisions that have been followed at least three times. (As also shown in Graph 4, when measuring decisions followed at least five times or more, the Traynor court outperformed the Bird court by a margin of more than 2 to 1.) The figures for the court under Chief Justice Ronald M. George are, of course, quite preliminary. There often is a gestation period of many years before a given decision is followed multiple times, but indications are that the current court is on track with the California Supreme Court's historic rates. By contrast, the long tenure of Chief Justice Phil S. Gibson (June 1940 to Aug. 1964) — despite being a period during which the court first developed a reputation for leading and innovative rulings — annually produced fewer than one opinion that has since been followed three or more times.



GRAPH 3: NUMBER OF DECISIONS THAT HAVE BEEN FOLLOWED AT LEAST THREE TIMES BY OUT-OF-STATE COURTS, BY STATE, 1986–2005

PRELIMINARY ANALYSIS OF THE DATA

What accounts for the role of the California Supreme Court — and, as shown above, Washington and other states — in producing more followed decisions than other state jurisdictions? We offer some possibilities:

1. *Depth of inventory, and a focused review selection system.* A populous jurisdiction with dynamic and diverse social, cultural, and economic conditions is most likely to produce a wealth of litigation capable of yielding leading decisions. If the highest appellate court of such a state possesses and carefully exercises review discretion in order to grant hearings in significant cases that may have broad impact, that court may well produce opinions that will be followed in other jurisdictions.

California's highest court certainly has a large and rich inventory of cases from which to select — the court considers approximately 5,400 petitions for review and 3,000 requests for original writs annually — but at least two other related factors also may be at work in producing significant opinions.

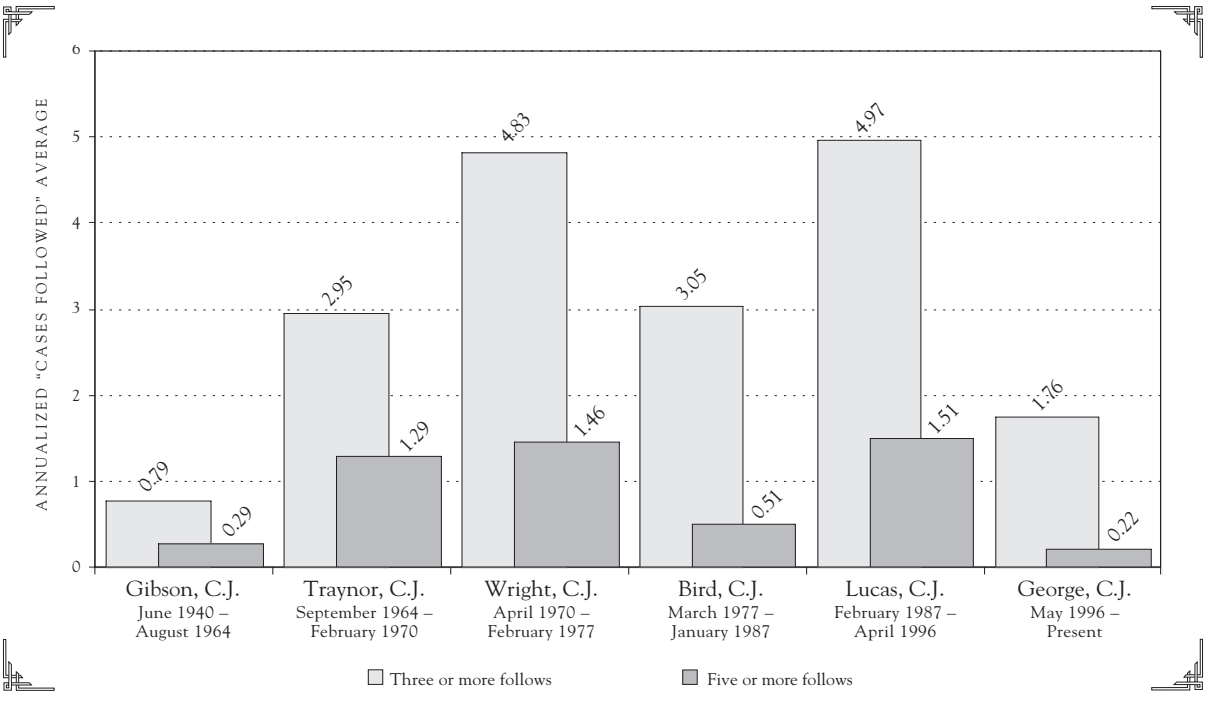
First, in most instances, matters come to the California Supreme Court on a petition for review from a written decision of the state's intermediate Court of Appeal, whose three-justice panels operate under an apparently rather unusual state constitutional provision requiring that all decisions be "in writing with reasons stated." These resulting intermediate appellate decisions are of generally high quality, and serve to focus the issues for the high court's consideration.

Second, the California Supreme Court employs professional legal central staffs (civil and criminal), whose primary task is to analyze intermediate appellate court decisions upon which review is sought, and to make recommendations to the court. The resulting internal memoranda frequently survey and note trends in appellate decisions, which greatly assists the court in carefully selecting the most appropriate vehicle for review of particular issues.

2. *Style and "culture" of high court opinions.* Another factor that may affect the rate at which a court's opinions are followed may be the type of opinion produced and the culture of the court that produces it.

There are, at the extremes, two contrasting ways to write an opinion that resolves a thorny or novel legal issue: (1) a concise approach that contains only minimal analysis before announcing a conclusion, or (2) a more extensive, explanatory and analytical approach. As a general matter — and for better or worse (mostly better we believe) — California Supreme Court decisions (and those of a number of other states) filed in the past 66 years tend to fall in the latter camp rather than the former.

3. *Regionalism and borrowed sources.* Some have been suggested that states grouped in the legal publisher West's seven regional reporters (Atlantic, Northeastern, Northwestern, Pacific, Southwestern, Southern and Southeastern) traditionally have had easier physical access to each other's cases, and have been more likely to cite and follow them for related reasons. Perhaps this may have been a significant factor many decades ago, but we doubt that in the computer age this point accounts for much.



GRAPH 4: ANNUAL AVERAGE NUMBER OF CALIFORNIA SUPREME COURT DECISIONS THAT HAVE BEEN FOLLOWED AT LEAST THREE TIMES BY OUT-OF-STATE COURTS, BY TERMS OF CALIFORNIA CHIEF JUSTICES, 1940–2005

All figures, including those for the continuing term of George, C.J. are based on data ending December 2005

A somewhat more likely explanation for perceived regional trends may relate to borrowed sources. That is, many states have over time adopted similar constitutional or statutory provisions, and some borrow from another state that happens to be located in the same West's region. Pursuant to traditional rules of interpretation, courts will, in appropriate circumstances, follow persuasive judicial constructions of provisions whose language or phrasing is similar to those construed in decisions of jurisdictions with similar provisions. Although this possible explanation for the comparative follow rates of various state high courts warrants further examination, from our review of the California cases decided 1940-2005 it does not appear that such decisions constitute a significant percentage of the follows generated. Indeed, as observed below, the "most followed" California cases are essentially common law decisions, not statutory-based decisions.

4. *Other possibly relevant factors: Reputation, professionalism, and "legal capital."* A number of additional factors have been discussed in the literature, and some bear further study. First, it is frequently suggested that certain cases are more likely to be followed because of perceptions concerning the reputation or prestige of a decision's author or of the authoring court generally. The same might be said of invoking the identity of certain appellate courts.

The literature also discusses a somewhat related concept, "judicial professionalism," defined as reasonable remuneration for judicial officers, modernized selection and organization processes, and some level of insulation from partisan politics. It has been suggested that high courts having those attributes may be positioned to produce decisions that are more principled and less political, and hence more likely to be followed.

Other factors discussed in the literature strike us as less likely to be major influences on follow rates. For example, some have emphasized each jurisdiction's stock of "legal capital" — the comparative number of decisions produced in the past and hence available to be cited or followed. In our view, the existence of a large inventory of decided cases, per se, is not a significant factor; as we have suggest above, of much greater significance is the existence of a possibly smaller inventory of decisions that have been carefully selected from a large and diverse pool of litigation.

EXAMPLES OF SOME "MOST FOLLOWED" CALIFORNIA CASES

Of course, numbers alone do not tell the full story, and so we will briefly review some of the prominent California "followed" cases alluded to above. Many of the most followed California decisions address difficult issues of broad application — that is, novel questions likely to arise in other jurisdictions — and some are probably quite familiar.

The earliest case of note in the California data, the 1942 decision in *Bernhard v. Bank of America* (19

Cal.2d 807), concerned collateral estoppel, and was followed six times by courts in other states. The most recent case also to be followed six times is the 1999 decision in *Temple Community Hospital v. Superior Ct.* (20 Cal.4th 464), which declined to recognize a new proposed common law tort of intentional third party spoliation of evidence.

In between those dates we find, from 1968, *Dillon v. Legg* (68 Cal.2d 728), which allowed limited bystander recovery for negligent infliction of emotional distress for close relatives of the direct victim. *Dillon* has been followed 20 times, more than any other opinion from any other state jurisdiction, and most recently was followed in a New Jersey decision in 2006.

Close behind *Dillon* comes the 1976 decision in *Tarasoff v. Regents of University of California* (17 Cal.3d 425), the landmark case regarding the duty of a mental health professional to protect others against reasonably foreseeable serious danger posed by a patient. This opinion has been followed by 17 out-of-state decisions and, like *Dillon,* is relied upon still and followed today, most recently by two 2004 decisions.

Many of the most followed California decisions involve tort liability. In addition to *Dillon* and *Tarasoff,* other landmark opinions include the 1988 decision in *Foley v. Interactive Data* (47 Cal.3d 654), concerning employment termination in violation of public policy, followed 15 times; the 1965 decision in *Seely v. White Motor Co.* (63 Cal.2d 9), holding that strict liability does not extend to recovery for purely economic loss, followed 10 times; the 1978 decision in *Barker v. Lull* (20 Cal.3d 413), concerning product design defect liability, followed 9 times; the 1977 decision in *Ray v. Alad* (19 Cal.3d 22), concerning successor-corporation liability, followed 13 times; the 1968 decision in *Rowland v. Christian* (69 Cal.2d 108), concerning premises liability and duty of care, followed 6 times; and the 1961 decision in *Lucas v. Hamm* (56 Cal.2d 583), allowing beneficiaries of wills to pursue a professional negligence action despite lack of privity, also followed six times.

Other notable most followed civil decisions involve the interpretation of insurance coverage, such the 1966 case of *Gray v. Zurich Ins. Co.* (65 Cal.2d 263), concerning a liability insurer's duty to defend, followed six times; the 1973 decision in *Gruenberg v. Aetna Ins. Co.* (9 Cal.3d 566), first recognizing the tort of insurance bad faith, also followed six times; and the 1995 decision in *Waller v. Truck Ins. Exchange* (11 Cal.4th 1), finding no duty to defend allegations of incidental emotional distress damages caused by the insured's noncovered economic or business torts, followed five times.

The most followed decisions involving criminal law or procedure include the 1978 case of *People v. Wheeler* (22 Cal.3d 258), prohibiting use of peremptory challenges to exclude prospective jurors on the basis of race. *Wheeler* has been followed 10 times, and also was followed in substantial part by the United States Supreme Court in 1986. *In re Alvernaz* (2 Cal.4th 924), a 1992 decision concerning ineffective assistance of counsel in the guilty plea context, has been followed seven times. *People v. Leahy* (8 Cal.4th 587), a 1994 case, imposed limitations on the use of a certain type of field sobriety test, and has been followed five times.

California Cases Likely to be Followed in the Near Future, and Pending and Impending Issues

recent cases likely to be followed

Most cases decided in the past 10 years are too recent to have generated substantial numbers of follows. Note, for example, that the leading cases of *Dillon* (followed 20 times since 1968) and *Tarasoff* (followed 17 times since 1976), discussed above, were each followed for the first time 10 years after the case was decided; indeed, more than half of *Dillon*'s follows have occurred *after* that decision's 20th anniversary in 1988, and two-thirds of *Tarasoff*'s follows have occurred *after* that decision's 20th anniversary in 1996.

With this in mind, and recognizing that reasonable minds may differ concerning which cases are likely to be found persuasive by other courts, we attempt to identify cases from the past few years that address novel questions likely to arise in other jurisdictions and in the future may join the ranks of California's most followed cases. Among those cases are some that already have been followed at least once: the 2000 decision in *Armendariz v. Foundation Health* (24 Cal.4th 83), concerning the test for determining unconscionability of mandatory employment arbitration agreements (followed twice); the 2002 decision in *San Remo Hotel v. San Francisco* (27 Cal.4th 643), rejecting a regulatory takings challenge to an ordinance designed to preserve residential housing stock (followed three times); and the 2003 decision in *People v. Batts* (30 Cal.4th 660), construing the California double jeopardy clause as more protective than the federal Constitution (followed once so far). Cases that have generated no follows as yet, but may be expected to do so, include the 2004 decision in *In re Marriage of Lamusga* (32 Cal.4th 1072), setting forth a test for determining a request by a custodial parent to move away from the area where the noncustodial parent lives; the 2005 decision in *Miller v. Department of Corrections* (36 Cal.4th 446), holding that widespread favoritism in the workplace can constitute actionable sexual harassment; and, most recently, the 2006 decision in *People v. Wilson* (38 Cal.4th 1237), addressing the "relevant population" for DNA statistical purposes.

PENDING AND IMPENDING ISSUES

A look at the court's docket and beyond suggests other interesting issues that may well produce decisions of interest to courts of other states. On docket presently are, among other issues, whether the proprietor of a mobile home park can be required to provide security guards or take other security measures to prevent gang-related violence on the premises (*Castaneda v. Olsher,* S138104); whether a physician has a constitutional right to refuse on religious grounds to perform a medical procedure (in vitro fertilization) for a patient because of the patient's sexual orientation (*North Coast Women's Care Med. v. Superior Ct.,* S142892); whether federal law preempts and precludes a state from prohibiting importation and trade of wildlife that has been delisted under the federal Endangered Species Act and thus is not currently regulated by federal law (*Viva! Intl. Voice for Animals v. Adidas,* S140064); whether an arbitration provision that prohibits employee class actions for violation of wage and hour laws is enforceable (*Gentry v. Superior Ct.,* S141502); and whether an inventor is entitled only to contract damages (and not tort damages, including punitive damages) following another's breach of an arrangement to develop or commercially exploit an invention (*City of Hope National Med. Center v. Genentech,* S129463).

Other issues and themes on the horizon for the California Supreme Court and other state high courts (in addition to the obvious one of same-sex marriage) include: use of eminent domain and zoning for social goals; mandatory identity card/ security issues; drug and related testing of student and professional athletes; jurisdictional issues relating to suits against Internet sites and service providers; liability of Internet sites for defamation and other torts; animal rights; cloning and biotech issues; use of genetic predisposition information as evidence in civil and criminal trials; and legal problems related to immigration and changing demographics.

CONCLUSION

Over several decades, many decisions of the California Supreme Court have been followed by the appellate courts of other states. That trend continues today, and will continue in the near future. At the same time, a number of other states, most notably Washington, have produced similar cases of importance to other jurisdictions. A full review of the complete data that we have collected would be interesting and useful. Specifically, we would like to see a more focused analysis of trends over decades and within other states, and whether the types of cases that have been followed differ significantly from one state to another. We hope that such studies will be undertaken in the near future, using our data or similar data.

Jake Dear is Chief Supervising Attorney, Supreme Court of California. Edward W. Jessen is Reporter of Decisions of California.

An Interview with Phil Gibson

Continued from page 1

mid-day as one is likely to encounter, chatting with The Chief and the vivacious Mrs. Gibson (herself a lawyer) in their lovely Carmel home. It provided a heady brew of good company, good conversation, pointed insight, vintage anecdote and fine Champagne — all of it too much for the recollective and reportorial capacities of an awed lawyer. The *Journal* must therefore, apologize for the shortcomings of its recounting of the provocative and evocative conversation.

CHIEF: Well, it certainly is an important subject you're working on, something I'm glad to see people thinking about. It takes real talent and effort to do a good job of handling an appeal.

JOURNAL: I think there are a lot of us who think that if you're a good trial lawyer, you're automatically going to be a good appellate lawyer.

CHIEF: No, that's not true. You take Jerry Giesler, for example. He was one of the best trial lawyers I ever knew, specialized in criminal practice and studied the whole law, but he wasn't an outstanding appellate lawyer. He didn't present his points on appeal nearly as well as he did in trial practice.

One of the best appellate lawyers in my experience, in the criminal field, was a deputy attorney general in Los Angeles some years ago. He was particularly good in oral argument. He never tried to kid the court; he laid it right on the line. If the case was against him, he said so; if he thought it could be distinguished, he tried to distinguish it, and if he didn't do that, he said it should be overruled because it was wrong — and he told us why. He never tried to fool the court by presenting a tricky argument and the court appreciated it. Time after time, I remember the members of the court leaving the bench after an argument and complimenting that man.

JOURNAL: That reminds me of one of the things I wanted to ask you about. There's been a lot of talk and writing lately about whether we should even have

California Supreme Court Historical Society

October 7, 2006 – Monterey
California State Bar Annual Meeting

"CALIFORNIA – LABORATORY OF LEGAL INNOVATION"

President Ray E. McDevitt urged guests attending the reception to join the work of the Society.

He later stated, "The large and attentive audience and the guests happily enjoying the refreshments on the sunny roof garden marked this as a most successful event."

(Photo: Howard Watkins)

The Society's 2006 MCLE panel program featured present and former justices as well as leading academics discussing the innovative role of the California Supreme Court as the "most cited and followed" state supreme court since 1940.

Professor Harry Scheiber of U.C. Berkeley Boalt Hall School of Law regrettably was prevented from participating in the program by emergency oral surgery on the day before the event.

Professor Gerald F. Uelmen of Santa Clara University School of Law graciously agreed to serve as a substitute speaker.

Opening announcements were made by Selma Moidel Smith, board member of the Society and Program Coordinator, who expressed the Society's appreciation for the honor conferred by the presence of Chief Justice Ronald George. She then introduced the Society's president, Ray McDevitt. The program was moderated by the Hon. Elwood Lui, who introduced each of the speakers, commencing with Associate Justice Kathryn Werdegar. Justice Werdegar requested that Jake Dear, Chief Supervising Attorney of the California Supreme Court, present the research that he and Ed Jessen, Reporter of the Court, had developed on the relative standing of the California Supreme Court. She then continued her presentation, and was followed by each of the other speakers.

Justice Lui later moderated a panel discussion by posing questions to each presenter. At the end of the program, the Society held its annual reception on the terrace adjoining the meeting room, where audience members had the opportunity to greet the Chief Justice, the speakers, and members of the Society.

Jake Dear

"Working with LexisNexis, the current provider of Shepard's Citation Service, we identified all opinions since 1940, for each of the 50 state high courts, that Shepard's has designated as having been followed by a state court outside the originating jurisdiction, and the number of times each such case has been followed.

"Our research reveals that the California Supreme Court has been, and continues to be, the most 'followed' state high court in the nation.

"And I'm happy to report to the Chief, who's in the back of the room, that we seem to be on a par with historic trends."

Attendees' comments included: "All of the speakers were outstanding, and the interaction was at the highest levels of scholarship, thought and civility – great job!" "Well prepared materials." "Very stimulating discussion." "Great panel." "Brilliant!" "Wonderful, informative discussion. Thanks for bringing in an out-of-state person, from New Jersey – gave good contrast to the issues." "All the panelists were excellent." "Provocative." "Very stimulating view of the development of the law." "Excellent!"

Hon. Kathryn M. Werdegar

"In Tort Law, an area that especially lends itself to judicial innovation, is the 1963 decision in *Greenman v. Yuba Power Products*. The so-called Greenman doctrine of strict product liability has been adopted by 37 states, and has been described as the single most dramatic change in tort law ever.

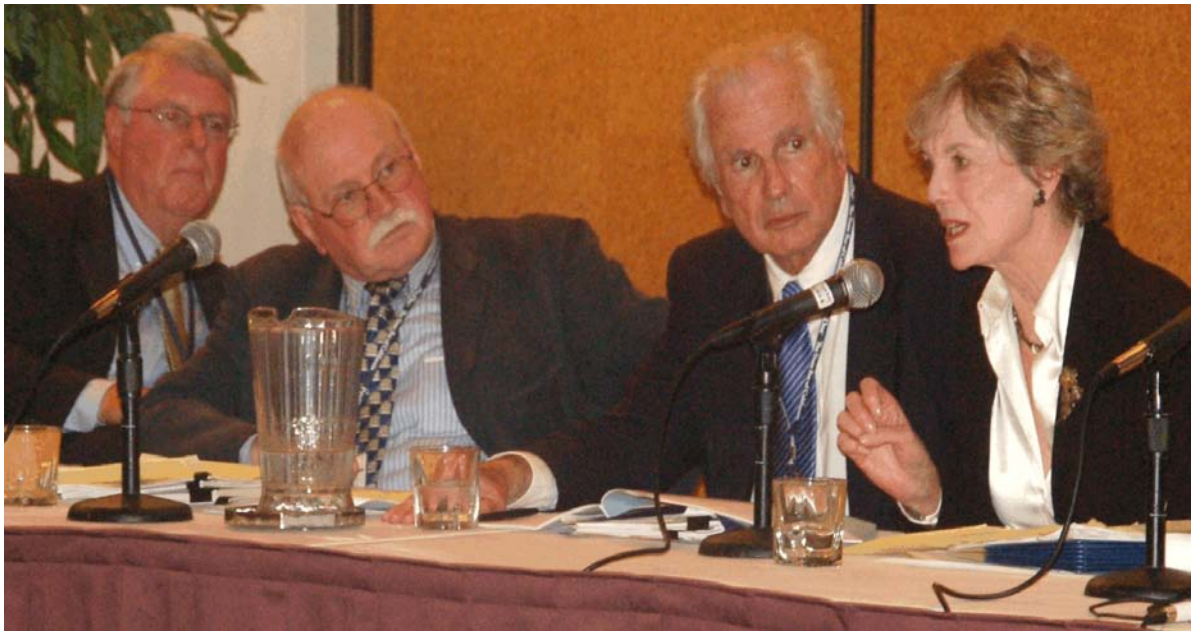
"Now I want to point out some of the issues before us today. The most obvious example of a high profile issue sure to come our way is in the gay marriage decision that was just handed down two days ago (by the District Court of Appeal). Issues already before us include whether an arbitration provision that prohibits employee class actions for violation of wage and hour laws is enforceable. Another is whether a physician, on first amendment religious grounds, can refuse to provide reproductive services to a lesbian. Another novel issue which is pending before us right now is whether California can ban the importation and trade of wildlife (kangaroos), when the wildlife in question has been de-listed under the federal endangered species act. We have certain guiding principles as to what cases we're going to grant review. We're guided by common sense. If there are conflicting Court of Appeal opinions, that means the courts and the litigants and the citizens need our guidance. If it's an initiative, then the State needs our guidance and can't wait for appeals to percolate. But we can't reach out – we can only work with what's brought to us. We get about 7,000 to 10,000 petitions a year and we grant about three or four percent of those, and we decide about 115 cases a year."

[Kathryn M. Werdegar is an Associate Justice of the California Supreme Court.]

Hon. Joseph R. Grodin

"The story of employment law in California starts with the Constitutional Convention of 1878 which declared that all persons have a right to pursue any business or occupation without regard to sex. This was an early version of the Equal Rights Amendment – the first of its kind in the country – and allowed Clara Shortridge Foltz to become a lawyer. The Progressive Movement was in dominance in the early part of the 20th century and in this state it was responsible for a number of innovations including our referendum process, and especially the Workers' Compensation Act of 1913 which was a landmark law, probably the most progressive in the country.

"On the judicial front, in 1940 Culbert Olson was elected governor of California, the first Democratic governor since 1900, and appointed as Chief



Professors Williams and Uelman, Justices Grodin and Werdegar. (Photo: Howard Watkins)

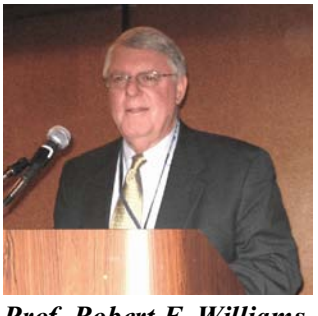
Seated: Selma Moidel Smith, Justice Elwood Lui. Standing: Justice Joseph R. Grodin, Prof. Robert F. Williams, Justice Kathryn M. Werdegar, Jake Dear, Prof. Gerald F. Uelmen, past president James Shekoyan, Chief Justice Ronald M. George. (Photo: Howard Watkins)

Justice a member of his cabinet, Phil Gibson, and an obscure Boalt law professor by the name of Roger Traynor, and I think it's fair to say, from that point the California Supreme Court began to take off. In 1944, the Court issued a unanimous decision in *James v. Marinship* holding that, while a labor union could have a closed shop, it couldn't also have a closed union that excluded black members...

"Finally, let me mention the California Fair Employment and Housing Act. Here we have a pattern of innovation which is a joint product of action and collaboration of the legislative and judicial branches. I tell my students that if they represent a plaintiff in an employment discrimination case, and they only talk about Title VII, without mentioning the FEHA, they're holding themselves open to a malpractice charge. It's broader in coverage, it provides more substantial remedies, it's broader in its definition of discrimination, it's substantive protections go well beyond the federal statute, and the California Supreme Court has applied the FEHA with sensitivity to the independent role it plays as a supplement to federally protected rights, and generally has not hesitated to depart from federal court interpretations of Title VII... The result of this continuing partnership between the courts and the legislature has been the development of an independent state jurisprudence of employment discrimination that it is fair to say is the most advanced in the nation."

[Joseph R. Grodin is Distinguished Emeritus Professor, UC Hastings College of the Law and former Associate Justice, California Supreme Court.]

"I want to talk about the California Supreme Court in the context of what we've come to call the 'New Judicial Federalism.' By this we mean the realization by state supreme courts that they may look at the state constitutional declaration of rights, or Bill of Rights, and interpret it to provide more rights even than those provided under the U.S. Constitution by the U.S. Supreme Court. I don't mean that the New Judicial Federalism always involves state courts going beyond, or being more protective, but that state courts recognize the potential for such an outcome, and that lawyers in those states recognize the viability of such arguments. For example, a search and seizure case might be won under the state constitution when the same argument has already lost in the U.S.



Prof. Robert F. Williams

Supreme Court. You could never make that argument except in a federal country, like ours. This kind of argument is beginning to be made in the eight or ten other federal countries that have states which have their own constitutions. The 1976 California Supreme Court decision in *People v. Disbrow,* was the centerpiece in Justice Brennan's famous article in the Harvard Law Review, which may be the most important development in the New Judicial Federalism, and Justice Brennan said toward the end of his life that this phenomenon of the New Judicial Federalism was the most important jurisprudential development of our times. A country consisting of states within states is what leads to the notion of having these laboratories of federalism, these bubbling experiments, attempting different solutions to legal and societal problems."

[Robert F. Williams is Distinguished Professor of Law and Associate Director of the Center for State Constitutional Studies at Rutgers University School of Law, Camden, New Jersey.]

Prof. Gerald F. Uelmen

"I want to take this occasion to congratulate Jake Dear and Ed Jessen on a marvelous piece of research. This paper is fascinating, it breaks new ground, it will be widely cited. And as for law professors, everyone studies and salivates over every nuance of U.S. Supreme Court decisions, but scholars like Bob Williams are a rather rare breed in the academy. I was struck by how many of the followed decisions of the California Supreme Court are tort decisions and how few are decisions in my field, criminal law and procedure. Why is that? The reason is that by constitutional amendment we have removed the California Supreme Court from that enterprise. No independent state grounds are available for the exclusion of evidence to protect constitutional liberties because of Proposition 8 in California. With the enactment of Proposition 8, sixty California Supreme Court precedents bit the dust, and ever since we've had to march lock step with the U.S. Supreme Court, which has demonstrated its hostility to exclusionary rules. I think the other reason is the dominance of the death penalty docket as a proportion of the California Supreme Court's workload, and such cases are not an area of innovation to be followed by other courts.

"When we look for the explanations for this really profound demonstration of influence of our California Supreme Court, what explanations do we have other than the brilliance and productivity of the justices and the professionalism and competence of its staff, which we should celebrate. One factor that is frequently overlooked is the competence of the appellate bar of the State of California. One reason that our Supreme Court gets an incredible menu of cutting-edge issues to decide is because we have a deep pool of expertise and excellence among the lawyers who are raising those issues and presenting them to the Court."

[Gerald F. Uelmen is Professor of Law at Santa Clara University School of Law, where he served as Dean from 1986-1994. He is also the Executive Director of the California Commission on the Fair Administration of Justice.]

"I'd like to acknowledge the presence of Justice Carlos Moreno from the Supreme Court – your colleague, Justice Werdegar – as well as Justice Kathryn Todd of the Court of Appeal in the Second District, Justice James Marchiano of the Court of Appeal in the First District, and Beth Jay, the Chief of Staff who makes the Supreme Court work for the Chief Justice."

Hon. Elwood Lui

Later, Justice Lui began the panel discussion: "What is the effect of the California rule requiring reasoned opinions and how does it help in determining cases for review and in deciding opinions? Does diversity of the population influence state court decisions? As for being innovative, it would seem to me that it should be totally irrelevant to the justices, that they'll do the right thing on the case and explain the reasons for which they reached their decision, and if it's innovative, it's for someone else to comment on.

"Let me close by offering my thanks to Jake and to Ed for those excellent statistics, and also, I would be remiss if I did not thank, and the panel echoes this as well... The work that Selma Smith did in conceiving, creating and managing this seminar has just been delightful."

[Elwood Lui is Partner-in-Charge at Jones Day, San Francisco, and former Associate Justice, California Court of Appeal, Second District.]

oral argument on appeals. I wanted to ask you about it — the usefulness of argument.

CHIEF: I think it's important; with some judges it's very important. Of course, it may not be quite as much so as it was at one time because the judges are better prepared at the time of oral argument now than they used to be. The fellow that I think is entitled to as much credit for that as any other man in California is Ray Peters. When he went on the District Court of Appeal, about the same time I went on the Supreme Court, he had two older men for associates, who were both good judges, but after all they had been on the court for some time while Peters had hardly any trial experience at all — he had been working for the Supreme Court as a research attorney. He was well known among lawyers, of course, as being able, but he was completely new to the District Court of Appeal.

Still, he immediately set up what he called a "conference system" which was something entirely new. It required the judges to hold a conference among themselves before oral argument. Before then, sometimes judges went out on the bench without knowing a damn thing about what was in the briefs.

In fact, when I went on the Supreme Court, the situation was much the same on that court. I was shocked at how little some of the members of the court knew about cases before they heard oral argument. So I set up a policy that's still practiced on the Supreme Court. Immediately on acquiring a case, we'd set up a conference and when we were in the conference I would assign the case to a member of the court to prepare what we called the Conference Memorandum on every case that came before our court on petition. So, when we were passing out petitions, we'd have this memorandum prepared by a judge and his staff setting up both sides of the argument in the petition for hearing.

Then, if it was decided at the conference to take the case over, I would assign the case to a judge. They follow a practice on the Supreme Court now which is much better in the long run, of assigning it in rotation, but I assigned it going around the table for a man to prepare the memorandum who had voted to hear the case. Anyway, the judge who was assigned would prepare it and have a memorandum which had to be circulated two weeks before our calendar. That way, every judge, when he went on the bench for oral argument, would have had an opportunity to study this calendar memorandum setting forth the arguments on both sides and sometimes with some original research of his own, or by his staff — quite frequently so, in fact.

When we went on the bench we knew pretty much what the case was about or at least most of us did. Some judges are just more industrious than others, as you know. But, we were pretty well informed, so we could ask questions of attorneys. By and large, we all thought oral arguments were very important. I know I did. I do like for attorneys to disclose all the facts, so I think I had a reputation of making it a little tough at times and, as I look back on it now, I think I was too tough on lawyers — probably scared some of them. If I had it to do over again — and I've told some members of the court this — I think I'd be a little more considerate of the fellow out in front.

At any rate, after the argument we'd go into conference and sometimes the oral arguments would have changed our views, some of us, at least. I don't think it did that very often, but it helped us, some members of the court. I always thought oral argument was useful — valuable — but only when it was well presented.

JOURNAL: There is a view we hear a lot about nowadays, to the effect that the court should only hear oral argument on certain, selected cases. What do you think of that idea?

CHIEF: Well, the problem is that you never know; you never know. I would say that lawyers would be surprised at the number of times judges change their views on the merits of the case before argument, and after for that matter. I've certainly changed my view on important cases, at least sometimes.

I remember times that I had a majority of the court with me — only one or two members raising any questions about the decision — then, the more I started working on the case, the more I became concerned and worried about it. So I'd circulate the memorandum to the members of the court, saying I was doubtful about my position. Then, I remember at least one rather important case where that happened and I got a unanimous opinion exactly *opposite* from what I started on.

So it happens, and I would say there is no reason why they shouldn't have oral argument. How are you going to tell? You can't tell whether — what case is it going to be useful in? It may not affect many cases, but you can't always tell beforehand what your views are going to be or what's going to happen to them.

JOURNAL: Of course, from a lawyer's standpoint, I think most of us feel shortchanged if we don't have oral argument.

CHIEF: Well, I think your clients do too.

JOURNAL: They certainly do.

CHIEF: So I think that's important, too. One thing I always argued with our court was that the public had to be taken into consideration — what their rights were and what they thought about the court. It's important that the people you're deciding cases for feel that they've had the proper amount of attention and work. That's all got to be taken into consideration. The record is for the people and they are entitled to a shot. I think it's rather important in the administration of justice, for everyone to at least feel he had a fair hearing.

JOURNAL: You mentioned lawyers fudging on the facts and misrepresenting them…

CHIEF: Well, not so much misrepresenting them as this: the facts have been determined already when they get to the appellate court, as you well know, but instead of accepting the facts found by the trial court — rightly or wrongly — we're bound by them unless they are just shocking — lawyers (and young lawyers, particularly) want to reargue the facts. One experience I regret was jumping all over a young lawyer who was trying to argue the facts to us. I should have been a little more considerate with him and explained the thing that some inexperienced lawyers don't realize — and that disturbs the court — that the lawyer can't reargue the facts. Unless, of course, he has a case where he says that you have no evidence at all to support the findings or the findings of the court are shocking in view of the evidence. There's nothing wrong with saying that, if it's really there in the case.

JOURNAL: What did you find — as opposed to ignoring the facts or trying to relitigate them — what did you find about the level of preparation of lawyers for oral argument? Was it satisfactory?

CHIEF: Oh, there's some difference. Some of them come in well prepared, are helpful, and impress the court. Time after time, I've heard judges say, as we've left the bench, "That was an argument; that was a job well done." Well now, that judge is influenced by that good argument; he's going to think some more. He may have been a little on the other side of the fence, but after a good argument he may want to have some second thought he didn't have before.

You know, most judges in all my experience on our court — and I've served with a lot of them (every judge that held a seat on that court when I became a member was dead when I left, so there was a turnover) — while they differed, all of them I served with tried to do a good job, tried to be objective.

You take a fellow like Jesse Carter, who was an excellent lawyer. Carter had his mind made up on so many damn things, it was awfully hard for him to change, but Carter certainly just *wanted* to be objective — he just was such a man of beliefs. I once told a meeting of chief justices from all over the country who were there in San Francisco that I sat with Jesse Carter, who was probably one of the most distinguished *advocates* on any bench anywhere in the United States. He was an advocate all the time he was on the bench, but he was *able*. You know, a lot of the things he advocated then are the law today, including things he wrote in his dissenting opinions. We were good friends; we went on the court at the same time.

He used to say that he was the only member of the court who had been judicially determined to be qualified. Once before that they had an argument over a very able lawyer from Marysville, a state senator, who almost got an appointment to the court, but then somebody raised the question whether he was qualified because he couldn't hold another elective office — while he was a senator, he couldn't be a justice of the Supreme Court since that was an elected position. The old gentleman, Chief Justice Waste, didn't think he could, so that man didn't get the appointment. And they raised the same question with Carter, because he was a state senator, but the court held he was qualified for appointment. So he used to say he had a judgment saying he was fit for the court and the rest of us didn't.

JOURNAL: That brings up another area of considerable concern or controversy around the appellate world, I guess: the selection or, in particular, the confirmation of judges of the Supreme Court and the Courts of Appeal.

CHIEF: Well, I guess I happen to know more about that than any other man in California. A lot of the information that's going around isn't authentic. They say that Radin was the only man ever turned down for a court appointment; it isn't true. The others they just never knew about. Governors withdrew appointments, or learned in advance that the appointment might not be confirmed, so they never even made the appointment.

For example, I remember one judge who was appointed to the Superior Court in Los Angeles County and did fine, but when there was talk about raising him to the District Court of Appeal, the Attorney General and another member of the commission came to see me and they said that they didn't want to hurt the young man, but he had been connected with somebody who was in danger of winding up making license plates in the penitentiary, so it looked like there might be two votes against him if the appointment were made. So the Governor withdrew the name and somebody else was appointed at the time. The judge went on to a long, fine career where he was.

There were two or three other occasions when men were proposed but not actually presented to the commission and the commission was doubtful, and there were a number of challenges and votes against appointments after they were made public. I know of one man who got a vote against him for the District Court of Appeal and he later went on the Supreme Court and had an outstanding record. Then there were several bad appointments, too.

There's a lot of talk now about the qualifications commission, the part of the old commission they named the Commission on Judicial Appointments. There's talk about enlarging that commission. Well, very soon after I became chief justice, I talked to members of the Board

of Governors of the State Bar about getting the State Bar into the Constitution, getting it statutory status. I thought it should be in the Constitution and I appeared in a meeting in San Francisco and urged them to get behind that, but they were afraid that if the State Bar presented that issue to the people and got turned down, the bar would lose prestige. I didn't think so, but they waited and eventually it was tied in with other constitutional provisions and got passed without any problems.

But what I proposed was a broadening of the membership of the qualifications commission. One fellow I talked to was O. D. Hamlin, who was president of the State Bar. You know Hamlin?

JOURNAL: The judge of the 9th Circuit now?

CHIEF: Yes, Hamlin was then bar president. He was from Oakland and I arranged a lunch with Homer Spence, who was very close to him, and urged his help in broadening of the base of the Commission on Judicial Appointments. I think I talked about it to him and other bar governors and people in state government for 10 to 12 years, urging that idea until finally we divided the old commission into two: the one on judicial appointments and a Commission on Judicial Qualifications. The one on judicial qualifications had the broadened bases that I recommended and they're doing some fine things now.

They should do a lot the same with the Commission on Judicial Appointments and it should be divided into regional bases. That is, not all of the appointments should come before the same commission with all the same members. If the Court of Appeal appointments are for the Los Angeles district, you should have a different commission than for a Court of Appeal appointment for San Francisco, for example. After all, they've got the interest and the information. I think the same fellow should be at the top all the time, the Chief Justice, and maybe certain other members should be on all the commissions.

We made that kind of proposal to the Legislature so long ago I've forgotten and they turned us down. One problem was we never got a hell of a lot of support out of the State Bar. Two fellows who always supported it were Herman Selvin and the other was, he was president of the State Bar when Selvin was on the board, Joe Ball from Long Beach. They were for it. I made a speech here in Monterey during the meeting of California bar executives and they were both present and really helped a lot on it, but still nothing came out of it.

I suppose some of the problem goes back to around the time when we got the State Bar into the Constitution. There was a lot of opposition then, probably because, you see, when I became Chief Justice, the Chief Justice absolutely ran the Judicial Council. He appointed all the members and he was it. And I didn't like that. I thought there should be changes. Of course, I thought the council should have more authority; I wanted to make rules. As you know, the courts had lost the rule-making power before that — had given it back to the legislature — and I wanted to get back into the rule-making business. As a matter of fact, that was the first speech I made after I became Chief Justice.

Broadening the base of the Judicial Council and getting members of the legislature and lawyers into it was one of the healthiest things that we ever had, and it was important to making the Judicial Council into what it's become. It couldn't do the things it does without the membership. The same thing should happen when it comes to judicial appointments. You could stop all of the agitation that's going on now — that happened over some of these appointments — if you had a broader base and more representation on the Commission on Judicial Appointments, give it the power to get some things done, too.

You shouldn't have to depend on pleasant surprises — although I've had a lot of them in my lifetime — with appointments. Maybe I gave a few surprises, too. I remember one time, just after I was appointed as an associate justice, two fellows in San Francisco took me out to dinner because my family was still packing up in Beverly Hills and I was living in a hotel. Two San Francisco judges that I had tried cases before wanted to make me feel a little comfortable in the city and they took me out to dinner in a place called John's Rendezvous. John had been in my outfit in France; he was a cook when I was a second lieutenant, both of us at the front, and by this time he had a good restaurant there in San Francisco. He put on quite a dinner for us. I guess he was proud that one of his old comrades had made good, or something of the sort, and so he really treated us. Anyway, after that we walked into the Bohemian Club and in the lobby we ran into a lawyer who had a great reputation around San Francisco, quite a guy. He said to one of the judges I was with: "I see where the Governor has just appointed a damn Communist onto the Supreme Court." And Dick Allen said: "Yes, I'll introduce you to him; here he is." That's OK, the lawyer and I got to be pretty good friends later on; he was an Irishman and he found out I was a little Irish. Anyway, people get surprised on appointments that aren't always so popular.

JOURNAL: I don't know that I'd want this printed, but I think there were some lawyers who were a little uneasy about the present Chief Justice, but they all think he's turning out to be a great surprise.

CHIEF: Wright? Well, he was popular with me! When he was on the municipal court in Pasadena I assigned him to the Superior Court because of the recommendation of some of the judges in the area. I put him in

a spot that he didn't like very much, too; not in Pasadena, but he had to travel clear across the county to San Fernando. He did a good job. And I know what kind of a job he did on the Superior Court, later. He wasn't the kind that always was popular with all of his fellows, but he was a good man who got things done, and after people got to know him he had plenty of friends among his associates, from what I hear. He's a good Chief Justice, doing a good job, an excellent job.

JOURNAL: He's become a great favorite among the lawyers of the state in very short order.

CHIEF: Well he's doing a good job. I thought he would when he was appointed, and I was very happy — I've been enthusiastic about him. Now, the fellow I was concerned about was probably my closest associate, Roger Traynor, because Traynor didn't like that kind of work. He was bored to death with a lot of the jobs the Chief Justice has to do which are not very much fun, not very exciting, and there's hours and hours of labor that don't get you anywhere much. Traynor would rather spend that time writing opinions — and there's never been anybody better than Traynor at that. What an able man! There certainly were able men on the court when I sat on it.

All the difference is, is that they're different jobs. In the first place, a Chief Justice has to run his court; he's got to have them happy. He's got to sit down around a conference table and be able to discuss the case objectively. The Chief Justice is the fellow who's got to walk up and down the hall and get the fellows to work together. You take this: There never were two men farther apart on any court in their personalities and attitudes than Traynor and Carter. They were just as far apart as night from day, and yet I had to get them to work together. The funny thing is, they were both so-called "liberals", and they were both real friends of mine, but they worked so differently. That's the kind of thing the chief has to work on. Of course, it helps to have men like those two and the others; they really gave me 100 percent support. Even when they're individualists.

I think it's become real clear to a lot of people, even the Chief Justice of the United States — very clear — there's so much else you have to do. The Chief Justice may not be as able as some of the other members of the court, but that doesn't really make any difference. He's got to give leadership and be able to get the most out of his court — whether he is all that able himself or not. That's absolutely essential. And it's a lot different job.

JOURNAL: To change the subject a bit, something just reminded me. What do you think about publishing opinions?

CHIEF: Well, I think they should be cutting down on the length on the opinions. A lot of the opinions are way too long, but I think the Supreme Court should publish an opinion in each case. A cut-down on all that length would be helpful, but that's a personal thing for the judge.

JOURNAL: You know, they're still writing opinions at the Court of Appeal level on every case, but they're only publishing 30 percent of them.

CHIEF: Well, they shouldn't have to publish them. Thirty percent of them published is all right, but five percent would be better. Actually, they shouldn't have to write so many opinions.

JOURNAL: Would you like to see them go to memorandum opinions?

CHIEF: Yes, in some cases. You know, there's an awful lot of those criminal cases, particularly, where it isn't necessary; there's nothing to them. A lawyer appeals them because he feels he has to go as far as he can for his client, but a memorandum of opinion should take care of it. Of course, I think we all approve of having opinions, in publishing them, when they are true law.

JOURNAL: Coming back to the subject of selection and so on, and some of the things you said a few years ago about the merit plan that was around then. You remember that stir?

CHIEF: Yes, they got pretty upset with me when I said I thought they should stay with the California system.

JOURNAL: There's some talk about it right now — talk about just adopting it for the Court of Appeal.

CHIEF: Oh, I think they should go all up and down the line, but using the California system. I've advocated it for years, at least 35 or 40 years. The selection of judges under the California system is much better than the one proposed by the State Bar, which I didn't think would work. I thought that proposal of the State Bar was taking the responsibility away from the governor and putting it nowhere. Under the traditional system in this country, there should be an executive appointment with a check on it and the check should be the Commission on Judicial Appointments — broadened and properly prepared. I argued that for years.

When they had that proposal to change the system a few years ago, I was advocating a broader base on the Commission and the fellow who was the president of the State Bar — who was it?

JOURNAL: John Finger?

CHIEF: Yes. He thought I had changed my mind and was kind of unhappy with me. I just told them off the cuff, but really it was what I always advocated, and that is: Let's stay with the California system and make it work.

JOURNAL: To put a blunt question, do you think it works with the commission the way it is now?

CHIEF: Well, it works fairly well, but not nearly as well as it should, without broadening the basis of the qualifications commission.

JOURNAL: What do you think of the idea of Senate confirmation as an alternative?

CHIEF: I'm absolutely opposed to it. I've had too much experience with it, and it is not good. Senate confirmation is throwing it right into the political heap. That's just not good. The best thing to do would be to stay with the California system, but improve it, broaden the base of the commission, give it a chance to do the job. That's the best thing they can do on judicial selection in California. That's been my opinion for over 40 years now — and it still is.

JOURNAL: Well, that's a pretty solid answer.

CHIEF: What you've got to do, besides changing the membership of the commission and having different commissions for appointments in the different areas, is give the commission a budget and a staff. The way it's been done, with some phone calls and private talks, doesn't work — and it isn't right, it isn't what the public is entitled to. There should be a staff that works, something like the staff of the Commission on Judicial Qualifications which deals with complaints against judges. The staff should get information on people who might be up for confirmation, or the Chief Justice or the Commission should be able to ask them to go out and gather information. The State Bar helps a lot when it's asked, but it doesn't really have the skill or time or ability to do that, or to keep consistent records or all the things you need if you're going to investigate something decently and make a sensible decision. You need, first, a commission with more people on it and the legislature and the lawyers represented, and, second, a place that can get its information and somebody it can send out to gather information. Then you get an intelligent decision on confirmation.

JOURNAL: May I switch to a different subject? I mentioned to you on the phone that I wanted to ask you for your view on the proposal to restructure the appellate levels — like the Court of Review.

CHIEF: You mean putting something in between the Supreme Court and the Court of Appeal? Like that national court they're talking about in Washington? Well, Professor Freund's a good friend of mine; a good personal friend, and a great lawyer, has been for a great many years, one of the ablest fellows in the country. But I think he's all wrong. I don't think you need it.

No, what you need — we've got part of it — what you need is a good intermediate appellate court, good Courts of Appeal. Work more on confirming their appointments, get rid of having to write an opinion for publication on every case (like we said) just to take a lot of room on the shelf, and that kind of thing. Give them the help they need, and we've got the courts we need to get the job done.

JOURNAL: One idea along that line I wanted to ask about was this: Many people are talking about the idea of eliminating divisions in the California Court of Appeal — go more to the federal system of one court with a lot of judges and rotating panels.

CHIEF: Well, that idea's got a lot to recommend it — if you have a good presiding justice! Everything depends on that. Just like one of the big Superior Courts, Los Angeles, San Francisco, those; everything depends on a good presiding justice.

I remember one of the bitterest personal attacks I ever had on me was over the proposal that the presiding judges of the Superior Court should be appointed by the Chief Justice. Any man that sat in that job as Chief Justice knows that the only way a Superior Court can operate efficiently is with a good administrator as presiding judge. And the Chief Justice, because of his assignment powers — and his assignment responsibilities — knows how a court operates, how every court in the state operates. He knows that, when there's a good man in the position of presiding judge, he can make his court operate, function more efficiently and more justly too.

Take for example Burke, when he was on the Superior Court, presiding judge in Los Angeles; he did an outstanding job, because he knew how to run a court. A lot of fellows thought he was stepping on toes, but there wasn't a court run like that one at the time. Where you have bad examples in the Superior Court is where the judges elect a presiding judge on a popularity basis or, worse, where they make the senior one presiding judge in turn, the way they do it in so many counties. It just doesn't work. You need someone who's good at that kind of thing, has a knack for it, and that's got nothing to do with how good a judge he is — it's just something different.

So if you have a Court of Appeal with all of the judges lumped together, you'd have to have a fellow at the head who is not just presiding justice by seniority or that kind of thing, but by his administrative ability. What happens otherwise is that the court can get so far behind that it's just not justice.

There was one time that one of the divisions of one of the courts was three and a half years behind and another division of that court only one year behind. If a lawyer won a case in Superior Court and it went up to the District Court of Appeal, as it was then called, if he hit one division he could have the case over with in a year, but if he hit another one he'd be stuck for three years before he had his judgment, and he had no choice about it — and no chance. And the difference was largely because of the men who happened to be

presiding in those two divisions. Of course, we moved in on the picture with Superior Court judges pro tem and cleaned it up within about two years or less. We even transferred cases from one district to another. They'd have to consent to it on both sides, but if lawyers wanted to get their cases over with, that was the only way they could get it done. There was one time, after we'd gotten so far behind, I wound up with six or seven judges on each three-judge division, and we were knocking the back log down fast — had them up to date in less than two years.

So when you talk about throwing the Court of Appeal judges all together, instead of in a division, it would be a good idea if you let the Chief Justice designate the presiding justice of that whole court. He'd do it on the basis of which one could be the best administrator.

JOURNAL: The one thing we've heard against the whole idea — and I understand it's actually something that this Judicial Council has hinted it might be in favor of — is the idea that the Presiding Justice, by hand-picking the panel, could pretty well predetermine the outcome of the case.

CHIEF: Oh, I suppose it's possible that you might get a bad Chief Justice someday, and that he'd put in a bad presiding justice, but I just don't think that's a real danger. The chief has a staff of his own and they know what's going on, and they all want to make their courts work. I think very few of them would play any kind of personal politics, none that I've ever known. I never did, and Traynor never did and I can't imagine Wright ever doing that.

The crucial thing is picking the presiding justice, but I don't think stacking a panel to decide a case is very likely; I don't think it would work. My father, who was a lawyer, told me you could never be sure who a woman would marry or what a judge would decide — and now, I guess there's something to that. Even just trying to figure out in advance people like Carter who had a slant, a really strong philosophy, but in many cases he surprised me.

They're all men of strong opinions, of course, or they wouldn't be there, but when judges get on the appellate court they surprise you with their independence and they surely try to be objective.

You take the United States Supreme Court, of course you know something about the attitudes of Brennan and Douglas and Marshall, because of the cases they participated in over the past, but there are two or three others you never can tell about. And you can never tell about any of them all of the time. When you've got a good court — like our present Supreme Court in San Francisco, we've got a good court there — nobody can tell in advance what any one judge is going to do on any one case. It depends on the record, the issues, the precedents, too many things, No, you can't worry too much about that.

One thing people don't realize is what hard work it is. Being on the appellate court, especially the Supreme Court, that's a full time job. This is one of the few courts in this country, you know, that is in session all the year round. I took one vacation, myself, and I was on the court 25 years or a little over. Most of the others were the same way. For instance, Shenk; he'd take a couple of weeks up in the country most years, but he always took his briefcase and cases right along with him. He used to call me up at home at night about the cases, too. Mentioning Shenk reminds me, sometimes we'd call him "the greatest distinguisher" because he hated to overrule a case; he'd distinguish it and distinguish it. Of course, a lot of the time we'd all go along with him if he came up with the right result in the end.

Another man you didn't hear much about but while I served with him was one of the ablest men on the Court, was Houser. A very able man, and the amazing thing is that he was sick — he had migraine headaches. How he suffered! He told me that he'd walk for miles and miles just trying to get hold of himself when he'd have that kind of headache, and yet the work he did, he was an able judge. We sure did have a lot of able judges that I served with, and a lot of able lawyers that I saw trying cases — that I tried cases with and against, too, for that matter.

I remember one fellow who used to try a lot of cases in Los Angeles, and he had this one against Bill Gilbert, the great trial man, a jury case. Anyway, all through the trial he kept referring to Gilbert as "Uncle Will;" every time he'd have some reason to mention him or turn to him, he'd call him "Uncle Will." And when Gilbert got up to make his argument to the jury he said: "You know, I had a brother who came up to this country many years ago," and he said, "He never married, but the rumor was that he had a son — and, by God, I finally found out who he is!"

Say, how about a glass of wine or something now?

JOURNAL: It would be a pleasure.

.....

And it was. A pleasure and an honor.

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FINANCIAL REPORT 2006

FISCAL YEAR ENDING JUNE 30, 2006

Income

Membership Dues	228,354.00
Bequests	6,974.79
Interest / Dividend Income	4,326.95
Other Income	75.00
Total	239,730.74

Expenses

Personnel	63,450.00
Outside Services	35,795.36
Website	935.65
Professional Dues	1,082.94
Donations / Grants	16,558.66
Staff & Volunteer Travel	3,830.65
Publications	15,753.07
Events & Meetings	4,902.42
Postage & Delivery	5,306.79
Office Rent	8,041.00
Supplies & Equipment	2,515.85
Database Management	5,617.40
Insurance	4,138.19
Telephone & Conferencing	3,070.95
Taxes	4,923.31
Bank & Merchant Charges	196.08
State Bar Administrative Costs	3,577.00
Depreciation	1,184.00
Total	180,879.32

THE CALIFORNIA SUPREME COURT

Historical Society

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Victoria Gibson Dies at 83

Victoria Glennon Gibson, the widow of Chief Justice Phil Gibson, died June 4 at age 83 after a long illness.

Mrs. Gibson was a lawyer, activist and conservationist who lived in Carmel Valley. She was born March 23, 1923 in Los Angeles, attended Barnard College, and graduated from Stanford University with a bachelor's degree in 1945 and a law degree in 1947.

After law school, Mrs. Gibson served as a law clerk for her future husband from 1947 to 1953. She also served as a member of the first panel of the state Central Coast Regional Zone Conservation Commission from 1972 to 1976, and on the state Parks and Recreation Commission from 1976 to 1979.

Mrs. Gibson is survived by her son, Blaine Gibson, a Seattle attorney and business consultant; and cousins, Judge Burt Glennon and cinematographer James Glennon, both of Los Angeles.

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TABLE OF CONTENTS